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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHKIE LEE,
on behalf of himself, FLSA Collective Plaintiffs and the Class,

Plaintiff,

v.

SHUN LEE PALACE RESTAURANT INC., d/b/a SHUN LEE PALACE, T&W RESTAURANT, INC. d/b/a SHUN LEE WEST, and MICHAEL TONG,

Defendants.

Case No.: 12-CV-8653

FIRST AMENDED CLASS AND COLLECTIVE ACTION COMPLAINT

Plaintiff, JOHKIE LEE ("Plaintiff"), on behalf of himself and others similarly situated, by and through his undersigned attorneys, hereby files this class and collective action Complaint against Defendants, T&W RESTAURANT, INC. d/b/a SHUN LEE WEST, SHUN LEE PALACE RESTAURANT, INC. d/b/a SHUN LEE PALACE, and MICHAEL TONG (each individually "Defendant" and collectively "Defendants") and state as follows:

MICHAEL TONG (each individually "Defendant" and collectively "Defendants") and state as follows:

INTRODUCTION

1. Plaintiff alleges, pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C. §§201 *et. seq.* ("FLSA"), that he is entitled to recover from Defendants: (1) unpaid minimum wages, (2) unpaid overtime, (3) liquidated damages and (4) attorneys' fees and costs.

2. Plaintiff further allege that, pursuant to the New York Labor Law ("NYLL"), he is entitled to recover from Defendants: (1) unpaid minimum wages, (2) unpaid overtime, (3) unpaid spread of hours premium, (4) cost of uniforms, (5) statutory penalties, (6) liquidated damages, and (7) attorneys' fees and costs.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this controversy pursuant to 29 U.S.C. §216(b), 28 U.S.C. §§1331, 1337 and 1343, and has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. §1367.

4. Venue is proper in the Southern District pursuant to 28 U.S.C. §1391.

PARTIES

5. Plaintiff, JOHKIE LEE, is a resident of New York County, New York.

6. Upon information and belief, Defendant, T&W RESTAURANT, INC. d/b/a SHUN LEE WEST is a domestic business corporation organized under the laws of New York, with a principal place of business and an address for service of process at 43 West 65th Street, New York, New York 10023.

7. Upon information and belief, Defendant, SHUN LEE PALACE RESTAURANT, INC. d/b/a SHUN LEE PALACE is a domestic business corporation organized under the laws of New York, with a principal place of business located at 155 EAST 55TH STREET, NEW YORK, NY 10022 and an address for service of process at C/O MCGUIRE WOODS LTD., 1345 AVENUE OF THE AMERICAS, 7TH FLOOR, NEW YORK, NEW YORK 10105.

8. Upon information and belief, Defendant, MICHAEL TONG, is the Chairman or Chief Executive Officer of SHUN LEE PALACE RESTAURANT, INC., with an address for service of process at 155 EAST 55TH STREET, NEW YORK, NEW YORK 10022.

9. Upon information and belief, Defendant, MICHAEL TONG is a principal of T&W RESTAURANT, INC., with a principal place of business at 43 WEST 65TH STREET, NEW YORK, NEW YORK 10023 and an address for service of process at 525 Park Ave., 7S, New York, New York 10021.

10. Defendants operated the two Shun Lee restaurants as a common enterprise. Each of the restaurants shared common ownership, were marketed jointly, shared common names, and employees and resources were interchangeable between the two restaurants.

11. MICHAEL TONG exercised control over the terms and conditions of the employment of the Plaintiff, FLSA Collective Plaintiffs and Class members. He had the power and authority to (i) fire and hire, (ii) determine rate and method of pay, (iii) determine work schedules and (iv) otherwise affect the quality of employment, of Plaintiff, the FLSA Collective Plaintiffs and the Class members. He also had the power

and authority to supervise and control supervisors of Plaintiff, the FLSA Collective Plaintiffs and the Class members.

12. At all relevant times, each of T&W RESTAURANT, INC. and SHUN LEE PALACE RESTAURANT, INC. was and continues to be an "enterprise engaged in commerce" within the meaning of the FLSA.

13. At all relevant times, the work performed by Plaintiff was directly essential to the business operated by Defendants.

FLSA COLLECTIVE ACTION ALLEGATIONS

14. Plaintiff brings claims for relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all tipped employees, including waiters, busboys, runners, delivery persons, bartenders and hostesses, employed by Defendants at any New York location on or after the date that is six years before the filing of the Complaint in this case as defined herein ("FLSA Collective Plaintiffs").

15. At all relevant times, Plaintiff and the other FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subjected to Defendants' decisions, policies, plans, programs, practices, procedures, protocols, routines, and rules, all culminating in a willful failure and refusal to pay them the proper minimum wage and overtime premium at the rate of one and one half times the regular rate for work in excess of forty (40) hours per workweek. The claims of Plaintiff stated herein are essentially the same as those of the other FLSA Collective Plaintiffs. Specifically, Plaintiff and FLSA Collective Plaintiffs claim that Defendants willfully violated Plaintiff's and FLSA Collective Plaintiffs' rights by failing to pay their minimum wages in the lawful amount for hours worked.

Defendants, however, were not entitled to take any tip credits under the FLSA, because they failed to properly provide notice to all tipped employees that Defendants were taking a tip credit.

16. The claims for relief are properly brought under and maintained as an opt-in collective action pursuant to §16(b) of the FLSA, 29 U.S.C. 216(b). The FLSA Collective Plaintiffs are readily ascertainable. For purposes of notice and other purposes related to this action, their names and addresses are readily available form the Defendants. Notice can be provided to the FLSA Collective Plaintiffs via first class mail to the last address known to Defendants.

RULE 23 CLASS ALLEGATIONS – NEW YORK

17. Plaintiff brings claims for relief pursuant to the Federal Rules of Civil Procedure ("F.R.C.P.") Rule 23, on behalf of all non-exempt persons, including waiters, busboys, runners, delivery persons, bartenders, hostesses, cashiers, cooks, dishwashers, food preparers and porters, employed by Defendants on or after the date that is six years before the filing of the Complaint in this case as defined herein (the "Class Period").

18. All said persons, including Plaintiff, are referred to herein as the "Class." The Class members are readily ascertainable. The number and identity of the Class members are determinable from the records of Defendants. The hours assigned and worked, the position held, and rates of pay for each Class member are also determinable from Defendants' records. For purposes of notice and other purposes related to this action, their names and addresses are readily available from Defendants. Notice can be provided by means permissible under F.R.C.P. 23.

19. The proposed Class is numerous that a joinder of all members is impracticable, and the disposition of their claims as a class will benefit the parties and the Court. Although the precise number of such persons is unknown, the facts on which the calculation of that number are presently within the sole control of Defendants, there is no doubt that there are more than forty (40) members of the Class.

20. Plaintiff's claims are typical of those claims, which could be alleged by any member of the Class, and the relief sought is typical of the relief, which would be sought by each member of the Class in separate actions. All the Class members were subject to the same corporate practices of Defendants, as alleged herein, of (i) failing to pay overtime compensation and "spread of hours" premium and (ii) improperly deducting from Class members' compensation the cost of uniforms. In addition, a subclass of Class members who were tipped employees suffered from Defendants' failure to pay minimum wage (based on Defendants' invalid tip credit). Defendants' corporate-wide policies and practices affected all Class members similarly, and Defendants benefited from the same type of unfair and/or wrongful acts as to each Class member. Plaintiff and other Class members sustained similar losses, injuries and damages arising from the same unlawful policies, practices and procedures.

21. Plaintiff is able to fairly and adequately protect the interests of the Class and have no interests antagonistic to the Class. Plaintiff is represented by attorneys who are experienced and competent in both class action litigation and employment litigation and have previously represented Plaintiff in wage and hour cases.

22. A class action is superior to other available methods for the fair and efficient adjudication of the controversy -- particularly in the context of the wage and hour

litigation where individual class members lack the financial resources to vigorously prosecute a lawsuit against corporate defendants. Class action treatment will permit a large number of similarly situated persons to prosecute common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of efforts and expense that numerous individual actions engender. Because of losses, injuries and damages suffered by each of the individual Class members are small in the sense pertinent to a class action analysis, the expenses and burden of individual litigation would make it extremely difficult or impossible for the individual Class members to redress the wrongs done to them. On the other hand, important public interests will be served by addressing the matter as a class action. The adjudication of individual litigation claims would result in a great expenditure of Court and public resources; however, treating the claims as a class action would result in a significant saving of these costs. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent and/or varying adjudications with respect to the individual members of the Class, establishing incompatible standards of conduct for Defendant and resulting in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. The issues in this action can be decided by means of common, class-wide proof. In addition, if appropriate, the Court can, and is empowered to, fashion methods to efficiently manage this action as a class action.

23. Defendants and other employers throughout the state violate the New York Labor Law. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former employees are fearful of bringing claims because doing so can harm their employment, future employment, and future efforts to secure employment.

Class actions provide class members who are not named in the Complaint a degree of anonymity, which allows for the vindication of their rights while eliminating or reducing these risks.

24. There are questions of law and fact common to the Class which predominate over any questions affecting only individual class members, including:

a) Whether Defendants employed Plaintiff and the Class within the meaning of the New York law;

b) What are and were the policies, practices, programs, procedures, protocols and plans of Defendants regarding the types of work and labor for which Defendants did not pay the Class members properly;

c) At what common rate, or rates subject to common methods of calculation, was and are Defendants required to pay the Class members for their work;

d) Whether Defendants properly notified Plaintiff and the Class members of their hourly rate and overtime rate;

e) Whether Defendants properly provided notice to all tipped employees that Defendants were taking a tip credit;

f) Whether Defendants caused tipped employees to engage in non-tipped duties exceeding 20% of each workday;

g) Whether Defendants paid Plaintiff and Class members the federal and state minimum wage for all hours worked;

h) Whether Defendants properly compensated Plaintiff and Class members for overtime under state and federal law;

i) Whether Defendants paid Plaintiff and the Class members the New York State "spread of hours" premium when their workdays exceeded ten hours;

j) Whether Defendants improperly deducted from Plaintiff's and Class members' compensation the cost of uniforms, in violation of the New York Labor Law;

k) Whether Defendants failed to properly compensate Plaintiff and Class members for all their hours work due to a policy of failing to correctly track the hours worked by Plaintiff and Class members;

STATEMENT OF FACTS

25. In or about July 2009, Plaintiff JOHKIE LEE, was hired by Defendants to work as a bartender and waiter for Defendants at their "SHUN LEE WEST" restaurant located at 43 West 65th Street, New York, New York 10023. His employment terminated in or about July 2010.

26. During Plaintiff JOHKIE LEE's employment, he worked over forty (40) hours per week and over ten (10) hours per day. Typically, Plaintiff JOHKIE LEE worked five days per week for 10-12 hours per day. Plaintiff, JOHKIE LEE, was paid an hourly rate, up to $4.00 per hour until the date his employment terminated, but at all times below the prevailing minimum wage and even below the tip credit minimum wage. At all times, Plaintiff, JOHKIE LEE, was a tipped employee.

27. Plaintiff's and Class members' paystubs did not accurately reflect their working hours. Defendants do not have a punch clock and do not accurately keep and maintain records reflecting the actual hours works by Plaintiff and Class members.

28. Plaintiff did not receive any tip credit notice. Class members did not receive any notice that Defendants were taking a tip credit until various times starting in 2011. However, even then, such tip credit notices did not satisfy statutory requirements. Prior to 2012, employees also were not provided with written notices as to their hourly rate of pay and overtime rate of pay.

29. Plaintiff and other tipped employees were required to engage more than 20% of their working time in non-tipped related activities such as: preparing food, cleaning the kitchen, cleaning the restaurant and other non-tip related activities.

30. During their employment with Defendants, employees, including Plaintiff, were required to wear a uniform consisting of a white shirt and apron. The uniform had to be purchased through Defendants at the cost of fifteen ($15.00) dollars. The clothing that Plaintiff was required to wear to work for Defendants constitutes a uniform within the meaning of the Fair Labor Standards Act and New York Labor Law. Defendants would provide the uniform, and a fifteen ($15.00) charge would be deducted from employees', including Plaintiff's, paychecks. Defendants have not reimbursed Plaintiff for the cost of purchasing the uniform. Defendants have not reimbursed Plaintiffs for the cost of cleaning and maintaining the uniform.

31. Defendants unlawfully failed to pay the Plaintiff, the FLSA Collective Plaintiffs, and members of the Class the Federal and State minimum wage for all hours worked. Plaintiff, the FLSA Collective Plaintiffs, and members of the Class often worked in excess of forty hours per week. The workdays of Plaintiff, the FLSA Collective Plaintiffs, and members of the Class regularly exceeded ten hours.

32. Defendants unlawfully failed to pay the Plaintiff, the FLSA Collective Plaintiffs, and members of the Class one-and-one-half times New York State and federal minimum wage for hours they worked over 40 in a workweek.

33. For the hours that Defendants did pay Plaintiff, Defendants paid Plaintiff, the FLSA Collective Plaintiffs and the Class members, the "tip credit" minimum wage, which is less than the federal and New York State minimum wages. Defendants, however, were not entitled to take any tip credits under the FLSA or NYLL, because they (i) failed to properly provide notice to all tipped employees that Defendants were taking a tip credit in violation of the FLSA and NYLL, (ii) failed to provide proper wage statements informing tipped employees of the amount of tip credit taken for each payment period in violation of the NYLL, and (iii) caused tipped employees to engage in non-tipped duties exceeding 20% of each workday in violation of NYLL, rendering the tip credit invalid in violation of the FLSA and NYLL.

34. Defendants knowingly and willfully operated their business with a policy of not paying either the FLSA minimum wage or the New York State minimum wage to the Plaintiff, FLSA Collective Plaintiffs and Class members due to the invalid tip credit that Defendants claimed.

35. Defendants knowingly and willfully operated their business with a policy of not paying either the FLSA overtime rate (of time and one-half) or the New York State overtime rate (of time and one-half) to the Plaintiff, FLSA Collective Plaintiffs and Class members.

36. Defendants knowingly and willfully operated their business with a policy of not paying the New York State "spread of hours" premium to Plaintiff and Class members.

Defendants also knowingly and willfully operated their business with a policy of causing Plaintiff and Class members to pay for required uniforms, in direct contravention of the New York Labor Law. In addition, Defendants knowingly and willfully operated their business with a policy of not providing proper wages statements as required under the New York Labor Law. Defendants are required to provide itemized listings of deductions taken on each wage statement. With respect to tipped employees, Defendants failed to satisfy the requirements under the NYLL because such tip credit allowance was never included in any wage statements to tipped employees and Defendants failed to disclose the proper overtime rate of pay.

37. Plaintiff retained Lee Litigation Group, PLLC to represent Plaintiff, FLSA Collective Plaintiffs and Class members, in this litigation and have agreed to pay the firm a reasonable fee for its services.

STATEMENT OF CLAIM

COUNT I

VIOLATION OF THE FAIR LABOR STANDARDS ACT

38. Plaintiff realleges and reavers Paragraphs 1 through 37 of this class and collective action Complaint as if fully set forth herein.

39. At all relevant times, Defendants were and continue to be employers engaged in interstate commerce and/or the production of goods for commerce within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207 (a). Further, Plaintiff and FLSA Collective Plaintiffs are covered individuals within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207 (a).

40. At all relevant times, Defendants employed Plaintiff and FLSA Collective

Plaintiffs within the meaning of the FLSA.

41. At all relevant times, each of Defendants T&W RESTAURANT INC., and SHUN LEE PALACE RESTAURANT, INC. had gross annual revenues in excess of $500,000.

42. At all relevant times, the Defendants had a policy and practice of refusing to pay overtime compensation at the statutory rate of time and one-half to Plaintiff and FLSA Collective Plaintiffs for their hours worked in excess of forty hours per workweek.

43. Defendants failed to pay Plaintiff and FLSA Collective Plaintiffs overtime compensation in the lawful amount for hours worked in excess of the maximum hours provided for in the FLSA.

44. At all relevant times, the Defendants had a policy and practice of refusing to pay the statutory minimum wage to Plaintiff and FLSA Collective Plaintiffs for their hours worked.

45. Defendants failed to pay Plaintiff and FLSA Collective Plaintiffs their minimum wages in the lawful amount for their hours worked.

46. Defendants willfully violated Plaintiff's and FLSA Collective Plaintiffs' rights by failing to pay them minimum wages in the lawful amount for hours worked. Defendants were not entitled to take any tip credits under the FLSA, because they failed to properly provide notice to all tipped employees that Defendants were taking a tip credit.

47. Records, if any, concerning the number of hours worked by Plaintiff and FLSA Collective Plaintiffs and the actual compensation paid to Plaintiff and FLSA Collective Plaintiffs should be in the possession and custody of the Defendants. Plaintiff intends to

obtain these records by appropriate discovery proceedings to be taken promptly in this case and, if necessary, will then seek leave of Court to amend this Complaint to set forth the precise amount due.

48. Defendants knew of and/or showed a willful disregard for the provisions of the FLSA as evidenced by their failure to compensate Plaintiff and FLSA Collective Plaintiffs at the statutory rate of time and one-half for their hours worked in excess of forty (40) hours per week when Defendants knew or should have known such was due.

49. Defendants failed to properly disclose or apprise Plaintiff and FLSA Collective Plaintiffs of their rights under the FLSA.

50. As a direct and proximate result of Defendants' willful disregard of the FLSA, Plaintiff and FLSA Collective Plaintiffs are entitled to liquidated (i.e., double) damages pursuant to the FLSA.

51. Due to the intentional, willful and unlawful acts of Defendants, Plaintiff and FLSA Collective Plaintiffs suffered damages in an amount not presently ascertainable of improperly retained tips, unpaid minimum wages and unpaid overtime wages, plus an equal amount as liquidated damages.

52. Plaintiff and FLSA Collective Plaintiffs are entitled to an award of their reasonable attorneys' fees and costs pursuant to 29 U.S.C. §216(b).

COUNT II

VIOLATION OF THE NEW YORK LABOR LAW

53. Plaintiff realleges and reavers Paragraphs 1 through 52 of this class and collective action Complaint as if fully set forth herein.

54. At all relevant times, Plaintiff and Class members were employed by the

Defendants within the meaning of the New York Labor Law, §§2 and 651.

55. Defendants willfully violated Plaintiff's and Class members' rights by failing to pay them overtime compensation at the rate of not less than one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a workweek.

56. Defendants willfully violated Plaintiff's and Class members' rights by failing to pay Plaintiff minimum wages in the lawful amount for hours worked. Defendants were not entitled to take any tip credits under the NYLL, because they (i) failed to properly provide notice to all tipped employees that Defendants were taking a tip credit in violation of the NYLL, (ii) failed to provide proper wage statements informing tipped employees of the amount of tip credit taken for each payment period in violation of the NYLL, and (iii) caused tipped employees to engage in non-tipped duties exceeding 20% of each workday in violation of NYLL, rendering the tip credit invalid in violation of the NYLL.

57. Plaintiff and Class members' workday regularly exceeded ten (10) hours. Defendants willfully violated Plaintiff's and Class members' rights by failing to pay "spread of hours" premium to Plaintiff and Class members for each workday that exceeded ten (10) hours.

58. Defendants improperly caused Class members to pay for their uniforms and caused Class members to pay for such uniforms by deducting directly from Class members' compensation.

59. Defendants knowingly and willfully operated their business with a policy of not providing proper wage statements as required under the New York Labor Law. Defendants are required to provide itemized listings of deductions taken on each wage

statement. With respect to tipped employees, Defendants failed to satisfy the requirements under the NYLL because such tip credit allowance was never included in any wage statements to tipped employees and Defendants failed to disclose the proper overtime rate of pay.

60. Due to the Defendants' New York Labor Law violations, Plaintiff and Class members are entitled to recover from Defendants their unpaid overtime, unpaid minimum wage, unpaid spread of hours premium, reasonable attorneys' fees, liquidated damages, statutory penalties and costs and disbursements of the action, pursuant to New York Labor Law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of himself, FLSA Collective Plaintiffs and Class members, respectfully requests that this Court grant the following relief:

a. A declaratory judgment that the practices complained of herein are unlawful under the FLSA and the New York Labor Law;

b. An injunction against Defendants and their officers, agents, successors, employees, representatives and any and all persons acting in concert with them as provided by law, from engaging in each of the unlawful practices, policies and patterns set forth herein;

c. An award of unpaid overtime compensation due under the FLSA and the New York Labor Law;

d. An award of unpaid minimum wages due under the FLSA and the New York Labor Law;

e. An award of unpaid "spread of hours" premium due under the New York Labor Law;

f. An award of liquidated and/or punitive damages as a result of Defendants' willful failure to pay overtime compensation and minimum wage pursuant to 29 U.S.C. § 216;

g. An award of liquidated and/or punitive damages as a result of Defendants' willful failure to pay overtime compensation, minimum wage, and "spread of hours" premium pursuant to the New York Labor Law;

h. An award of prejudgment and postjudgment interest, costs and expenses of this action together with reasonable attorneys' and expert fees and statutory penalties;

i. Designation of Plaintiff as Representative of the FLSA Collective Plaintiff;

j. Designation of this action as a class action pursuant to F.R.C.P. 23;

k. Designation of Plaintiff as Representative of Class;

l. An award equal to the cost of uniforms improperly deducted by Defendants from compensation of Plaintiff and Class members; and

m. Such other and further relief as this Court deems just and proper.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury on all issues so triable as of right by jury.

Dated: March 11, 2013

Respectfully submitted,

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